6852

DOCKETED
USNRC

'88 AUG -3 P1:15

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	Docket Nos.
	)	50-443-444-OL -1
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL.	)	(On-site EP)
	)	
(Seabrook Station, Units 1 and 2),	)	August 2, 1988

RESPONSE OF
MASSACHUSETTS ATTORNEY GENERAL JAMES M. SHANNON
TO COMMISSION ORDER OF JULY 14, 1988

INTRODUCTION

On July 14, 1988, the Commission issued its order authorizing the Applicants, the Staff, the Mass AG and other Intervenors to file responses addressing the Mass AG's financial qualifications petition.

On July 22, 1988, the Applicants filed their response accompanied by the Affidavit of John F. G. Eichorn, Jr., the Chairman and CEO of Eastern Utilities Associates.[1/] On the same day, the Staff filed its response, accompanied by a July 13, 1988 press release concerning the decision of Northeast Utilities to advance the Massachusetts Municipal

---

1/ Eastern Utilities Associates is the parent company of Montaup Electric Corporation, a 2.9% owner of Seabrook, and EUA Power Corporation, a 12% owner of Seabrook. Eichorn Affidavit ¶ 1.

D503

Wholesale Electric Company ("MMWEC") its Seabrook payments through the end of this month.

The Applicants and the Staff, as well as the Appeal Board in its July 5, 1988 decision on the financial qualifications petitions (ALAB-895), fundamentally misapprehend the purpose of the NRC's financial qualifications rule and the showing required to obtain a waiver from it. The rule allows the Commission to conduct its financial qualifications inquiry, required by the Atomic Energy Act, on a generic rather than individualized basis for regulated utilities. The rule proceeds from the assumptions that those utilities are under the jurisdiction of public utility commissions and would likely recover sufficient costs of safe operation in ratemaking proceedings. Those assumptions do not apply here because Seabrook's lead owner is subject to New Hampshire's anti-CWIP law and is within the jurisdiction of the federal bankruptcy court. Rather than address these central issues, the Applicants, the Staff and the Appeal Board conclude that the Mass AG and Intervenors must demonstrate that a shortage of funds exists or is certain to exist before a waiver can be given, effectively claiming that a financial qualifications inquiry cannot be opened until the subject of the inquiry is decided. The Commission should reject that position and order that the record in the on-site proceedings be reopened for a full financial qualifications proceeding.

ARGUMENT

A. THE COMMISSION'S FINANCIAL QUALIFICATIONS RULE IS BASED ON THE BELIEF THAT PUBLIC UTILITY COMMISSIONS WILL CONTROL AND AUTHORIZE FUNDING THROUGH RATEMAKING.

Under the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 et seq., each application for a construction permit or operating license "shall specifically state such information as the Commission, by rule or regulation, may determine to be necessary to decide such of the technical and financial qualifications of the Applicant . . . as the Commission may deem appropriate for the license." 42 U.S.C. § 2232(a). In 1956, the Atomic Energy Commission adopted a rule that applicants must be "technically and financially qualified to engage in the proposed activities." 10 CFR § 50.40(b)(1956). In 1968, the Commission amended the regulation by requiring each applicant to submit information "sufficient to demonstrate to the Commission" that it either possesses funds necessary to cover the estimated costs of operation, shut down and maintenance or "has reasonable assurance of obtaining the necessary funds." 10 CFR § 50.33(f)(1982). The rule requires such information as estimates of costs, identification of sources of funds and financial statements. 10 CFR Part 50, App. C (1982).

On January 6, 1978, the Commission issued an order resolving, inter alia, the financial qualifications issue for the Seabrook construction permit. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1 (1978). The Commission affirmed the findings of the Licensing

Board and Appeal Board and concluded that there was "reasonable assurance" that the Applicants were financially qualified. The case raised concerns for the Commission about the "seemingly tenuous link between safety and financial qualification, particularly for a large regulated utility." Id. at 19. Therefore, the Commission directed the staff to initiate a rulemaking proceeding "in which the factual, legal and policy aspects of the financial qualifications issue may be reexamined." Id. at 20.

On March 31, 1982, the Commission adopted a new rule, eliminating case-by-case financial qualifications determinations for electric utilities applying for either construction permits or operating licenses. 47 Fed. Reg. 13751 (1982). In doing so, the Commission abandoned one of the premises of the rule in its proposed version -- that regulated utilities generally recover the costs of construction and operation through the ratemaking process. Compare 46 Fed. Reg. 41786, 41788 (1981) with 47 Fed. Reg. 13751. The rule was defended principally with the claim that there was no "demonstrated link between public health and safety concerns and a utility's ability to make the requisite financial showing." Id. The rule was then challenged in court, and remanded by the DC Circuit to the Commission because the remaining justifications for the rule did not support the rule's singling out of public utilities. New England Coalition on Nuclear Pollution v. NRC, 727 F.2d 1127, 1130-1131 (DC Cir. 1984).

On September 12, 1984, after another round of rulemaking designed to cure this defect, the Commission again promulgated a rule excepting public utilities from case-by-case financial qualifications determinations.[2/] 49 Fed. Reg. 35747 (1984). This time the rule was firmly grounded in the assertion that the ratemaking process "assures for regulated electric utilities . . . the ability to meet the costs of safe operation of a nuclear power facility." 49 Fed. Reg. at 13045 (rationale in proposed rule explicitly relied upon in final rule, 49 Fed. Reg. at 35748).

> The Commission believes that case-by-case review of financial qualifications for all electric utilities at the operating license stage is unnecessary for the following reason. Utilities are usually regulated through state and/or federal economic agencies, and generally are allowed to recover all or a portion of the costs of constructing generating facilities and all of the costs of operation, subject to the oversight of such state and/or federal agencies. 49 Fed. Reg. at 13045.

The Commission placed great emphasis on a national survey conducted by the National Association of Regulatory Utility Commissioners ("NARAUC"). The survey indicated that ratemaking authorities always considered safety-related operating costs as reasonable expenses recoverable through rates. 49 Fed. Reg. at 35749. The survey results were bolstered by NRC Staff visits to several public utility commissions. Id. at 35750.

2/ Because of the financial difficulties experienced by some plant owners at the construction stage and because no construction permit proceedings were then pending, the Commission elected to "focus" on the operating license stage rather than the construction stage. 49 Fed. Reg. 13044, 13045 (April 2, 1984)(proposed rulemaking).

The Commission concluded that the necessary predictive finding on the financial integrity of regulated utilities could be made on a generic rather than a case-by-case basis:

> The Commission believes that the record of this rulemaking demonstrates generically that the rate process assures that funds needed for safe operation will be made available to regulated electric utilities. Since obtaining such assurance was the sole objective of the financial qualification rule the Commission concludes that, other than in exceptional cases, no case-by-case litigation of the financial qualification of such applicants is warranted. Id.

B. THE BASIS FOR THE FINANCIAL QUALIFICATIONS RULE HAS NO APPLICATION IN THIS CASE.

The Commission acknowledged in its 1984 rulemeking that the rule's rationale was of "limited applicabiliy." 49 Fed. Reg. 35748 n. 1. If the applicant is an electric utility which can look to ratemaking authorities to ensure the payment of costs of operation, the rule applies -- if not, the rule does not apply. The Commission emphasized its reliance on the presence of ratemaking authority in its response to an assertion raised by the State of Texas during the 1984 rulemaking. Texas, in its comments on the rule, indicated that because a state may be preempted by the NRC from judging the financial capabilities of its utilites, the states may not, in fact, have effective ratemaking authority. Significantly, the Commission did not view the suggested lack of authority as irrelevant. Instead, it disagreed with the Texas claim, noting that either state public utility commissions have sufficient ratemaking authority or publicly-owned utilities have independent rate-setting authority. Id. at 35749. Either way, sufficient authority

existed to enable the Commission to make the generic finding that costs would be met.

The Seabrook case presents a situation neither contemplated by the Commission nor governed by the limited rationale expressed in its rulemaking. New Hampshire law forbids recovery from ratepayers before commercial operation of any costs associated with the Seabrook plant. NHRSA 378: 30-9. See In re Public Service Co. of New Hampshire, 130 N.H. 265, 539 A.2d 263 (1988). Moreover, the availability of funds to PSNH for low-power operation and testing[3/] is presently within the control of the federal bankruptcy court, not the New Hampshire Public Utilities Commission.[4/] The interests at play in the bankruptcy, including those of vendors, stockholders, bondholders and other holders of security interests in Seabrook and other PSNH assets, are much broader and more complex than in a state or federal ratemaking proceeding.

The Atomic Energy Act requires a finding which predicts an applicant's financial ability to operate, shut down and maintain a nuclear plant. The Commission, in an exercise of

---

3/ Once low-power testing occurs, the Applicants subject themselves to increased operating costs and, by the NRC's calculations, $54.6 million to $84.8 million in decommissioning costs. See Mass AG Petition, Supplement to Mass AG Petition, and Brief Amicus Curiae of U.S. Senator Gordon J. Humphrey, Att. 1 (July 29, 1988).

4/ See Massachusetts Attorney General James M. Shannon's Petition Under 10 CFR § 2.758 For A Waiver Of Or An Exception From The Public Utility Exemption From The Requirement Of A Demonstration Of Financial Qualifications." (March 7, 1988).

its discretion, has elected to make that finding generically based on certain key assumptions. Those assumptions do not apply in this case. Therefore, there is no basis for such a finding.[5/] As the DC Circuit stated when it remanded the 1982 rule, the Commission has relied on "the peculiar characteristics of public utilities that assure solvency." New England Coalition, supra 727 F.2d at 1129. That reliance is obviously misplaced here for Seabrook's bankrupt lead owner. The Commission can make the requisite financial qualifications finding only by waiving its rule, reopening the record of the on-site proceedings and addressing the exceptional circumstances that have overtaken PSNH.

C. THE APPLICANTS, STAFF AND APPEAL BOARD MISREAD THE PURPOSE OF THE RULE AND THE BURDEN TO OBTAIN A WAIVER FROM IT.

In ALAB-895, the Appeal Board interpreted the waiver provision in the context of the Mass AG and Intervenor petitions as requiring a showing that "the applicants have insufficient funds to cover the costs of low-power operation." ALAB-895 at 20. The Appeal Board granted the Mass AG petition based upon MMWEC's decision to cease monthly payments and attempt to sell its ownership share:

> As matters now stand, the remaining joint owners and applicants will have a substantial 11.59340% deficiency in monthly operating expenses and the additional funds necessary to operate Seabrook safely at low power at the expiration of that period. Id. at 37.

5/ The Act itself lists "the character of the applicant" as an appropriate consideration for the Commission. 42 U.S.C. § 2232(a). Where, as here, that character departs significantly from the character which forms the basis for the generic rule, an individual determination should be made.

In their responses to the Commission's Order of July 14, 1988, the Applicants and the Staff advocate the same general approach and argue similar points on why the Appeal Board should be overturned. The Applicants criticize the Appeal Board for its "exercise in speculation" on the funding shortfall caused by MMEWEC's actions. Applicants' Response at 5. The Staff claims that the agreement by Northeast Utilities to advance MMWEC's share through August 31, 1988 renders the waiver petition without a "present basis." NRC Staff Response at 10. The most concise formulation of the position of both the Applicants and the Staff appears at pages 6-7 of the Applicants' Response:

> When, as and if, the Seabrook project, in fact, runs short of funds and thereby is unable adequately to fund safety related matters, then the prima facie case is made and not before.[6/]

This approach ignores the most critical issue for any waiver petition -- the purpose of the underlying rule. See 10 CFR § 2.758(b)("The sole ground for petition for waiver or exception shall be that special circumstances with respect to the subject matter of the particular proceeding are such that application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted."). The purpose of the rule has no application and cannot be furthered here because the ratemaking mechanism

---

6/ The approach of the Appeal Board is somewhat different. The Appeal Board would not require a present shortage of funds. Instead, the Board concludes that the petitioners must show that a shortage will occur at some defined point in the future. See ALAB-895 at 37.

supposedly available to provide reasonable assurance of funding is not available to PSNH.[7/]

Moreover, the Applicants and the Staff are in effect making the extraordinary claim that a petition seeking only a case-by-case inquiry (and thus an exception to the present rule) must meet a greater burden than exists for the petitioners in the inquiry itself. The Commission has created a process for reaching a predictive finding about the financial integrity of operating license applicants. That process does not require a showing that all of the necessary funds are presently available but rather only that the applicant "has reasonable assurance of obtaining the funds." 10 CFR § 50.33(f)(2). Conversely, a party challenging an applicant's financial qualifications need not establish a present shortfall in funds if he can show that the requisite "reasonable assurance" does not exist. The Applicants and the Staff argue that in order to force an individualized inquiry the petitioners must show a present shortage in funds. In other

---

7/ The position of the Appeal Board and the Applicants here is not completely consistent with their positions in the Seabrook construction permit case. The Appeal Board, in finding the Applicants financially qualified to construct the plant, placed great weight on the prospect of future rate increases by the New Hampshire PUC. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 77 ("it is scarcely likely that the PUC would stand in the way of the establishment of those rates necessary to enable Public Service to fulfill the obligation imposed upon it by its nuclear facility licenses."). The Applicants urged the Commission to affirm the Appeal Board "on the theory that public utility commissions must be presumed to discharge their duties responsibly." PSNH, supra, 7 NRC at 17.

words, the petitioners bear a greater burden on their waiver petition than they do on the merits.[8/] The argument is unreasonable and should be rejected.[9/]

Finally, the claim that the shortfall left by MMWEC's actions no longer exists is, for the reasons set forth above, irrelevant. Nevertheless, even if the Commission reaches the claim, it should reject it. MMWEC's actions stand and the Applicants and Staff have done nothing more than show that the effect of the actions will be mitigated for one month. After August 31, 1988, the shortage will exist again. The "opinion" of John F.G. Eichorn, Jr. that an "arrangement will be concluded" to cover MMWEC's share until August 31, 1989 is entitled to no weight in this context. While Mr. Eichorn's hopefulness is understandable, the fact remains that no agreement has been reached. To suggest otherwise is to engage in "an exercise in speculation," to quote the Applicants.

8/ The Appeal Board would place on the petitioners a burden equal to that they bear on the merits. Although not as extreme as the position of the Applicants and the Staff, it is still inconsistent with 10 CFR § 2.758.

9/ Under Commission case law, there is strong support for a finding on the merits that the Applicants are not financially qualified. In Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), LBP-74-58, 8 AEC 187 (1974), the Licensing Board found that a 3.694% joint owner possessed only "marginal" financial qualifications because its earnings had dropped and Moody's had withdrawn its rating of the utility's first mortgage bonds. Id. at 194-196. The Appeal Board endorsed the Licensing Board's findings and observed that if the participant owned a larger share of the facility (such as the 39.75% interest of the Millstone lead owner) "it would have been doubtful whether the applicant would have had the requisite financial qualifications." ALAB-234, 8 AEC 643 (1974). See PSNH supra, 7 NRC at 8 n. 10. Unknowingly, the Appeal Board described the later financial circumstances of the Seabrook joint owners with remarkable accuracy.

CONCLUSION

For all the foregoing reasons, the Mass AG petition should be granted.

Resptectfully Submitted,

JAMES M. SHANNON
ATTORNEY GENERAL
COMMONWEALTH OF MASSACHUSETTS

By: _____

Stephen A. Jonas
Deputy Chief
Public Protection Bureau
Department of the Attorney General
One Ashburton Place, 19th Floor
Boston, Massachusetts 02108
(617) 727-2200

DATED: August 2, 1988

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

In the Matter of	
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL. (Seabrook Station, Units 1 and 2)	Docket No.(s) 50-443/444-OL-1

CERTIFICATE OF SERVICE

I, Stephen A. Jonas, hereby certify that on August 2, 1988, I made service of the within RESPONSE OF MASSACHUSETTS ATTORNEY GENERAL JAMES M. SHANNON TO COMMISSION ORDER OF JULY 14, 1988, by first class mail, or by Federal Express as indicated by [*] to:

Alan S, Rosenthal, Chairman
Atomic Safety and Licensing
Appeal Panel
U.S. Nuclear Regulatory
Commission
East West Towers Building
4350 East West Highway
Bethesda, MD 20814

Howard A. Wilber
Atomic Safety and Licensing
Appeal Panel
U.S. Nuclear Regulatory
Commission
East West Towers Building
4350 East West Highway
Bethesda, MD 20814

Thomas S. Moore
Atomic Safety and Licensing
Appeal Panel
U.S. Nuclear Regulatory
Commission
East West Towers Building
4350 East West Highway
Bethesda, MD 20814

Mr. Ed Thomas
FEMA, Region I
442 John W. McCormack Post
Office and Court House
Post Office Square
Boston, MA 02109

Administrative Judge Sheldon J.
Wolfe, Esquire, Chairman
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory
Commission
East West Towers Building
4350 East West Wighway
Bethesda, MD 20814

Robert Caraigg, Chairman
Board of Selectmen
Town Office
Atlantic Avenue
North Hampton, NH 03862

Administrative Judge,
Emmeth A. Luebke
4515 Willard Avenue
Chevy Chase, MD 20815

Dr. Jerry Harbour
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory
Commission
East West Towers Building
4350 East West Highway
Bethesda, MD 20814

Adjudicatory File
Atomic Safety and Licensing
Board Panel Docket
U.S. Nuclear Regulatory
Commission
East West Towers Building
4350 East West Highway
Bethesda, MD 20814

Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory
Commission
Washington, DC 20555

Philip Ahrens, Esquire
Assistant Attorney General
Department of the Attorney
General
Augusta, ME 04333

Paul McEachern, Esquire
Matthew T, Brock, Esquire
Shaines & McEachern
25 Waplewood Avmnue
P.O. Box 360
Portsmouth, NH 03801

Mrs. Sandra Gavutis
Chairman, Board of Selectmen
RFD 1 - Box 1154
Route 107
Kensington, NH 03827

Senator Gordon J. Humphrey
U.S. Senate
Washington, DC 20510
(Attn: Tom Burack)

Diane Curran, Esquire
Andrea C. Ferster, Esquire
Harmon & Weiss
2001 S Street, NW / Suite 430
Washington, DC 20009

Stephen E. Merril, Esquire
Attorney General
George Dana Bisbee, Esquire
Assistant Attorney General
Office of the Attorney General
25 Capitol Street
Concord, NH 03301-6397

Sherwin E. Turk, Esquire
Office of General Counsel
U.S. Nuclear Regulatory
Commission
One White Flint North, 15th Fl.
11555 Rockville Pike
Rockville, MD 20852

Robert A. Backus, Esquire
Backus, Meyer & Solomon
116 Lowell Street
P.O. Box 516
Manchester, NH 03105

Mr. J. P. Nadeau
Selectmen's Office
10 Central Road
Rye, NH 03870

Thomas G. Dignan
Ropes & Gray
225 Franklin Street
Boston, MA

Mr. Calvin A. Canney
City Manager
City Hall
126 Daniel Street
Portsmouth, NH 03801

R. Scott Hill-Whilton, Esquire
Lagoulis, Clark, Hill-
Whilton & McGuire
79 State Street
Newburyport, MA 01950

Senator Gordon J. Humphrey
One Eagle Square, Suite 507
Concord, NH 03301
(Attn: Herb Boynton)

Mr. Peter S. Matthews
Mayor
City Hall
Newburyport, MA 01950

Mr. Thomas F. Powers, III
Town Manager
Town of Exeter
10 Front Street
Exeter, NH 03833

Mr. Willimm S. Lord
Board of Selectmen
Town Hall - Friend Street
Amesbury, MA 01913

H. Joseph Flynn, Esquire
Office of General Counsel
Federal Emergency Management Agency
500 C Street, S.W.
Washington, DC 20472

Brentwood Board of Selectmen
RFD Dalton Road
Brentwood, NH 03833

Gary W. Holmes, Esquire
Holmes & Ells
47 Winnacunnet Road
Hampton, NH 03841

Richard A. Hampe, Esquire
Hampe and McNicholas
35 Pleasant Street
Concord, NH 03301

Judith H. Mizner, Esquire
79 State Street, 2nd Floor
Newburyport, MA 01950

Charles P. Graham, Esquire
Murphy and Graham
33 Low Street
Newburyport, MA 01950

Lando W. Zech, Jr., Chairman
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, MD 20852

Thomas M. Roberts, Commissioner
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, MD 20852

Kenneth M. Carr,
Commissioner
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, MD 20852

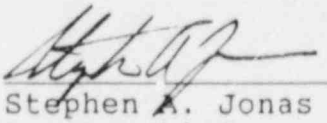
Frederick M. Bernthal,
Commissioner
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, MD 20852

Kenneth C. Rogers,
Commissioner
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, MD 20852

William C. Parler, Esquire
General Counsel
Office of the General Counsel
One White Flint North
11555 Rockville Pike
Rockville, MD 20852

Marjorie Nordlinger, Esquire
Deputy General Counsel
Office of the General Counsel
One White Flint North
11555 Rockville Pike
Rockville, MD 20852

*Docketing and Service
U.S. Nuclear Regulatory
Commission
1717 H Street
Washington, DC 20555



Stephen A. Jonas
Deputy Chief
Public Protection Bureau
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
(617) 727-2200

DATED: August 2, 1988